

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

TACOMA NARROWS LUMBER COMPANY,)	
INC. and CITY OF STEILACOOM,)	
)	SHB No. 90-30
Appellants,)	
)	
v.)	FINAL FINDINGS OF FACT,
)	CONCLUSIONS OF LAW AND ORDER
STATE OF WASHINGTON, DEPARTMENT)	
OF ECOLOGY,)	
)	
Respondent.)	

This matter came on for hearing on October 9, 1990 in Lacey, Washington, before the Shorelines Hearings Board, William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Judith A. Bendor, Chair, Harold S. Zimmerman, Annette S. McGee, Nancy Burnett, Steven Morrison, and Richard Gidley.

The matter is a request for review of a shoreline conditional use permit for a bulkhead granted by the Town of Steilacoom to Tacoma Narrows Lumber Company and disapproved by DOE.

Appearances were as follows:

1. Mark E. Holcomb, Attorney at Law, for Tacoma Narrows Lumber Company;

2. Robert J. Backstein, Attorney at Law, for the Town of Steilacoom;

3. Kerry A. O'Hara, Assistant Attorney General, for the Department of Ecology.

1 Lisa Alger of Gene Barker & Associates provided court reporting
2 services.

3 Witnesses were sworn and testified. Exhibits were examined.
4 From testimony heard and exhibits examined, the Shorelines Hearings
5 Board makes these

6 FINDINGS OF FACT

7 I

8 This matter arises on Chambers Bay in the Town of Steilacoom.

9 II

10 The site in question is 20 acres more or less. It is a peninsula
11 created by fill in the 1920s as a sawmill site. The saw mill ceased
12 operations in 1984, and has been entirely removed, leaving the
13 peninsula vacant.

14 III

15 The wooden bulkhead which once stood along the waterward
16 perimeter of the fill has been allowed to deteriorate. Over about two
17 thirds of the length of the waterward perimeter, the bulkhead has
18 completely failed. This has allowed tidal waters to move behind the
19 bulkhead (landward).

20 IV

21 With the neglect of the bulkhead, erosion of the peninsula has
22 followed. Erosion is ongoing. Erosion has occurred in prior years
23 including erosion in the past year.

V

Erosion of the peninsula has freed sediments which have been deposited at an adjacent marina where it has reduced water depth. Erosion has contributed to the closing of one boathouse slip at the marina.

VI

Both the peninsula and adjacent marina are owned by appellant, Tacoma Narrows Lumber Company, Inc. (TNLC). The TNLC has not made application for any ensuing use of the peninsula. The peninsula is zoned "waterfront commercial." Pending development of the peninsula in a manner economically commensurate with its value, TNLC has allowed marina occupants to build boathouses (covered moorages) on the peninsula.

VII

On June 26, 1989, TNLC applied to the City of Steilacoom for a shoreline conditional use permit to replace the failed bulkhead and repair that lesser length which still holds back the water.

VIII

The TNLC permit application stated:

Repair/Replacement of bulkhead to a state comparable to its original condition.

An attached site plan refined the meaning of the application by showing a bulkhead alignment similar to the original 1920s alignment.

1 Tidal incursions resulting from the failed bulkhead were to be land
2 locked.

3 IX

4 The Town of Steilacoom (Town) planning staff recommended denial.
5 This recommendation was largely due to the land locking of tidal
6 incursions. The Town Planning Commission, after viewing the site,
7 approved a bulkhead permit for TNLC but specified that it be located
8 at the "mean high water line." This would be landward of the original
9 bulkhead alignment, yet not so far landward as the "ordinary high
10 water mark" which is the term used in the Shoreline Management Act.

11 X

12 The State Department of Fisheries joined with the Town planning
13 staff in urging denial of the application, though initially both
14 consented to a bulkhead at the "ordinary high water mark."

15 XI

16 On April 27, 1990, the permit was disapproved by respondent
17 Department of Ecology on grounds that it was inconsistent with
18 bulkhead and landfill provisions in the Town's Shoreline Master
19 Program (TSSMP).

20 XII

21 Testimony by the Town planning staff at the hearing before us
22 indicates agreement with a bulkhead at the ordinary high water mark.
23 By letter of June 27, 1990, however, Department of Fisheries has
24
25

1 changed its position. Whereas it previously had supported some
2 bulkheading at the ordinary high water mark it now urges that
3 bulkheading be further landward to protect wetland vegetation.
4 Fisheries cites Executive Order 90-04, April 21, 1990, relating to
5 wetlands.

6 XIII

7 Appellant requests review of Department of Ecology's
8 disapproval. At hearing before us, TNLC agreed to align its bulkhead
9 at the ordinary high water mark.

10 XIV

11 Any Conclusion of Law deemed to be a Finding of Fact is hereby
12 adopted as such. From these Findings of Fact, the Board makes these

13 CONCLUSIONS OF LAW

14 I

15 The issuance of a shoreline conditional use permit must be
16 approved by the Department of Ecology. RCW 90.58.140(12). The
17 disapproval in this case has led to three issues set forth in the
18 Pre-Hearing Order entered June 15, 1990. These concern 1) bulkheads,
19 2) landfill and 3) shoreline stabilization. We take these up in turn.

20 II

21 Bulkheads. Bulkheads are a conditional use under the Town of
22 Steilacoom Shoreline Master Program (TSSMP). TSSMP, p. 27. That
23 provision goes on to provide, in pertinent part:

1 3. Bulkheads shall be allowed only when evidence is
2 presented that one of the following exists:

3 c) Bulkheads are necessary to re-establish a
4 shoreline boundary that has been eroded away within
5 the past one (1) year. TSSMP, P. 28.

6 We have found that erosion has occurred in prior years including the
7 past year. Finding of Fact IV, supra. The erosion requirement of the
8 TSSMP Regulation 3(c), p. 28, requires that a shoreline boundary has
9 been eroded away within the past one year. The meaning of this is not
10 that a dramatic loss of shoreline must have occurred within a year.
11 The focus of the regulation, rather, is upon an "eroded" shoreline.
12 The ordinary meaning of the word "erode" can be determined by
13 reference to the dictionary. Erode is defined as follows: "to
14 diminish or destroy by degrees." Webster's Third New International
15 Dictionary (emphasis added). Thus the regulation contemplates loss of
16 shoreline by degrees over many years. All that is required by the
17 regulation is that erosion continues to occur within the past year.
18 That latter, one-year requirement assures that bulkheads will not be
19 placed where erosion has ceased. In this case, the progressive
20 effects of erosion have not ceased and are on going. The shoreline
21 boundary of the peninsula is being diminished by this erosion. This is
22 occurring throughout the tidal regime, including erosion into
23 vegetated uplands, excepting only where the relic bulkhead may still
24 be functional.

1 We conclude that the erosion requirement of the TSSMP Regulation
2 3(c), p. 28, has been met. A bulkhead on the waterward perimeter of
3 the peninsula is consistent with this provision.

4 III

5 Landfill. Under the TSSMP "landfill" is defined as follows:

6 Landfill is the placement by man of sediment or other
7 material (excluding solid waste) in an aquatic area to create
8 new shorelands or on shorelands to raise the elevation of the
9 land. TSSP, p. 29.

8 Further, a policy of the TSSMP provides:

9 Landfills should be allowed only when necessary to
10 facilitate water dependent and water-related use . . .
11 TSSMP, p. 30.

12 There is no application now before us which proposes landfill. Yet
13 the issue arose by implication when the Town approved a bulkhead at
14 the "mean high water line". That line, as we have found, lies
15 waterward of the "ordinary high water mark." Finding of Fact IX,
16 supra. A bulkhead at "the mean high water line" would thus require
17 fill as a practical matter. Yet Ecology could not know whether such
18 fill served a water-dependent or water related use because TNLC has
19 not made application for any use of the peninsula. Thus the bulkhead
20 location was fill dependent when fill was not ripe for consideration.
21 We believe that the role of fill in siting this bulkhead has vanished
22 with TNLC's relinquishment of "the mean high water line" and
23 commitment to the "ordinary high water mark." We conclude that the
24 bulkhead application before us does not propose fill.

IV

Shoreline Stabilization. The TSSMP provides that:
shoreline stabilization and flood protection and
actions taken to reduce adverse impacts caused by
current, flood, wake or wave action. TSSMP, p. 31.

Further, the TSSMP provides:

3) Stabilization and protection works shall be
permitted only for the following purposes:

(b) Protection of existing industrial, commercial
or residential areas or valuable natural features.
TSSMP, p. 32.

The proposed bulkhead is for stabilization and protection of a filled
peninsula created for industrial purposes and so used for 60 years.
The peninsula is currently zoned "waterfront commercial." Findings of
Fact II and VI, supra. As such it is an existing industrial or
commercial area. We conclude that the proposal constitutes shoreline
stabilization permitted under TSSMP Regulation 3, p. 32.

V

Lastly, we are doubtful that this shoreline application (made in
June, 1989) would be subject to Executive Order 90-04 of April, 1990.
See Talbot v. Gray, 11 Wn.App. 807 (1974). Moreover, this record does
not contain any exposition of the application of the Executive Order
to the facts at hand. We conclude that the Executive Order is not a
bar to this proposal.

VI

In summary, a bulkhead which adheres to the "ordinary high water mark" on the site would be consistent with the TSSMP provisions at issue and entitled to conditional use approval.

The term "ordinary high water mark" is used and defined in the Shoreline Management Act at RCW 90.58.030(2)(b). It is defined either by reference to a tidal line or a vegetation line. TNLC should determine whether the tidal line or the vegetation line governs the site, prior to construction. Ideally, this determination would be made at an early date in consultation with Ecology. Ecology has not identified the location of the OHWM at this time.

VII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

The shoreline conditional use permit at issue is remanded to the Town of Steilacoom for reissuance in the same form as previously provided that the term "ordinary high water mark" shall replace the term "mean high water line." With this condition, the permit is affirmed.

DONE at Lacey, WA, this 7th day of May, 1991.

SHORELINES HEARINGS BOARD

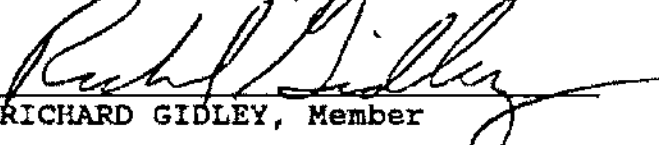
(See Concurring Opinion)
JUDITH A. BENDOR, Chair


HAROLD S. ZIMMERMAN, Member


ANNETTE S. MCGEE, Member


NANCY BURNETT, Member


STEVEN MORRISON, Member


RICHARD GIDLEY, Member


WILLIAM A. HARRISON
Administrative Appeals Judge

1 CONCURRING OPINION - BENDOR

2
3 I concur in the result.
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6 JUDITH A. BENDOR, Chair
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26 CONCURRING OPINION - BENDOR
27 SHB No. 90-30